

# ANALYSIS OF ORIGINAL BILL

## Franchise Tax Board

Author: Burton Analyst: Marion Mann DeJong Bill Number: SCA 7  
Related Bills: See Legislative History Telephone: 845-6979 Introduced Date: 01/10/2002  
Attorney: Patrick Kusiak Sponsor: CA Newspaper Publishers Assoc.

**SUBJECT:** Access to Government Information

### SUMMARY

This is a proposal to place a constitutional amendment on the ballot that would:

- make it a constitutional right to attend, observe, and be heard in the meetings of elected and appointed public bodies;
- make it a constitutional right to inspect and copy records made or received in connection with the official business of any public body, agency, officer, or employee;
- specify that the Legislature could continue to provide for the protection of government information about a private person; and
- permit the Legislature to limit the right of public access to government information to protect public safety or private property, to ensure the fair and effective administration of justice, or to provide for the preservation of public funds and resources.

### PURPOSE OF THE PROPOSED CONSTITUTIONAL AMENDMENT

According to the fact sheet provided by the author's staff, the purpose of this measure is to give Californians the right to:

- define how open their government should be,
- know what their government is doing,
- express their views by being able to attend meetings of key government bodies and be heard in those meetings, and
- find out information held in government records.

### EFFECTIVE/OPERATIVE DATE

The next general election in which this proposed constitutional amendment could be included would be November 5, 2002, and the amendment, if approved, would be effective the day after the election upon approval of a majority of those who vote on the ballot measure.

### POSITION

Pending.

Board Position:

<u>      </u> S	<u>      </u> NA	<u>      </u> NP
<u>      </u> SA	<u>      </u> O	<u>      </u> NAR
<u>      </u> N	<u>      </u> OUA	<u>  X  </u> PENDING

Department Director

Date

Gerald H. Goldberg

2/22/02

## **ANALYSIS**

### **FEDERAL/STATE LAW**

The Bagley-Keene Open Meeting Act requires that all meetings of a state body be open and public. A state body conducting a meeting is required to:

- provide an agenda and specified notice of its public meetings at least 10 days in advance of the meeting,
- declare the reason for a closed session prior to the closed session and cite the specific statutory authority for the closed session, and
- report, at a subsequent public meeting, any action or roll call vote to appoint, employ, or dismiss a public employee made during a closed session.

Under federal law, the Freedom of Information Act (FOIA) requires federal agencies to make public information available upon request, unless specifically exempted by law. The provisions under FOIA are similar to the California Public Records Act.

The California Public Records Act requires that all state and local agencies make their public records available for public inspection during office hours, unless exempted by law. When a member of the public either makes a request to inspect or obtain a copy of a public record, to the extent possible, the agency must:

- assist the requester to identify records and information that may be responsive to the request or the purpose of the request,
- describe where the records are located (e.g., information technology or actual physical location), and
- assist the requester with reasonable options to obtain records responsive to their inquiry.

The California Public Records Act also requires that if a state agency withholds any public record, it must demonstrate that the record was exempt from disclosure, or the public interest for nondisclosure outweighed the public interest for disclosure.

Existing federal and state laws prohibit the disclosure of any taxpayer information, except as specifically authorized by statute. Any Franchise Tax Board employee or member responsible for the unauthorized disclosure of federal or state tax information is subject to criminal prosecution. Improper disclosure of federal tax information is a felony and improper disclosure of state tax information is a misdemeanor.

### **THIS CONSTITUTIONAL AMENDMENT**

This measure would make it a constitutional right for a person to attend, observe, and be heard in the meetings of elected and appointed public bodies. The measure would also make it a constitutional right to inspect and copy records made or received in connection with the official business of any public body, agency, officer, or employee, or anyone acting on their behalf.

These constitutional rights would not limit the ability of the Legislature to enact laws for the protection of government information about a private person unless the information relates to the qualifications or fitness of a person for any elective or appointive government office.

The measure also provides that the Legislature could limit the right of public access to government information, but only if necessary to protect public safety or private property, to ensure the fair and effective administration of justice, or to provide for the preservation of public funds and resources. If the Legislature were to choose to enact a statute in reliance on one of the above exceptions, the measure requires that, before any public body, agency, officer, or employee applies such a limitation to deny access to an official meeting or a public record, there would have to be a particularized finding demonstrating a substantial probability of serious harm to the public interest that the denial would avert. In other words, there would have to be a finding that harm could not be averted by reasonable alternatives. The denial of access could be no broader in scope or longer in duration than necessary to avert the identified harm.

### IMPLEMENTATION CONSIDERATIONS

If adopted, this measure would limit the Legislature's ability to enact legislation that establishes limitations on the right of public access to governmental information. It is unclear the extent to which adoption of this measure would invalidate all or portions of any existing statutes that limit public access to governmental information. For example, it is unclear how this measure would impact bidding and contract processes, communications between department staff and the Governor or Governor's staff, and communications between department staff and members of the three-member Franchise Tax Board in closed session. Further, it is unclear how a person would exercise the rights provided by this measure during a hearing of a tax appeal before the Board of Equalization. Could any member of the public intervene during such a hearing? If current practices or existing statutes are invalidated, the department may need to revise some department procedures and practices to protect confidential information.

### **LEGISLATIVE HISTORY**

SB 48 (Sher, 1999/2000) and SB 2027 (Sher, 1999/2000) would have amended the California Public Records Act to require that state agencies justify the withholding of any record by demonstrating in writing that a record is exempt from disclosure or the public interest is served by not making the record public. These bills would have established a procedure to allow any person to appeal to the Attorney General if a state or local agency denies access to a public record or subverts the intent of the bill by actions short of denial of inspection. Governor Davis vetoed SB 48 because of its interaction with another bill he signed and its potentially significant costs. Governor Davis vetoed SB 2027 because of the "bureaucratic reporting mechanism" the bill was establishing and its potentially significant costs. The sponsor cites these vetoes as one of the reasons that a constitutional amendment is necessary.

AB 2799 (Shelley, Stats. 2000, Ch. 982) required denials of requests for public records to be in writing.

AB 192 (Canciamilla, Stats. 2001, Ch. 243) made modifications to the Bagley-Keene Open Meeting Act, including requiring a posted agenda for teleconference meetings and requiring a notice posted on the Internet when a state body intends to take actions on items not included on a posted agenda.

AB 1014 (Papan, Stats. 2001, Ch. 355) requires agencies when responding to a request for public records to estimate the date and time the records will be available and to provide additional services (e.g., help the requestor identify records).

### **OTHER STATES' INFORMATION**

According to information provided by the author's staff, several other states, including Florida, Tennessee, Montana, and New Hampshire, have constitutional provisions guaranteeing public access to the government.

### **FISCAL IMPACT**

This measure would not significantly impact the department's costs.

### **ECONOMIC IMPACT**

This measure would not impact the state's income tax revenue or the Franchise Tax Board's administration of state income tax.

### **ARGUMENTS/POLICY CONCERNS**

Current statutes provide the rights proposed by this constitutional amendment. However, the sponsors of this measure argue that existing laws have not stopped widespread secrecy in government. They state that a public body or official can cite a statutory exemption from access to public information without providing a justification that shows what is being protected.

### **LEGISLATIVE STAFF CONTACT**

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